IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MAUREEN A. DUNNING and, MICHAEL DUNNING, her husband,	)	
Plaintiffs,	)	
v.	)	C.A. No. 03C-12-012 JRJ
LOIS C. McCLOSKEY,	)	
Defendant.	)	

Date Submitted: August 18, 2005
Date Decided: March 15, 2006
Date Amended: March 23, 2006

AMENDED OPINION

Upon Defendant's Motion to Dismiss — **DENIED**

Upon Plaintiffs' Cross Motions for Extension of Time — **GRANTED**

Upon Plaintiffs' Cross Motions to Amend the Complaint— **GRANTED**

Lisa C. McLaughlin, Esquire, 1200 North Broom Street, Wilmington, Delaware 19806, Attorney for the Plaintiffs.

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JURDEN, J.

Before the Court is a Motion to Dismiss filed on behalf of the deceased Defendant, Lois C. McCloskey, and the Plaintiffs' Maureen A. Dunning and Michael Dunning's Cross-Motions for Extension of Time and to Amend the Complaint. For the reasons set forth below, the Defendant's Motion to Dismiss is **DENIED,** the Plaintiffs' Motion for Extension of Time is **GRANTED**, and the Plaintiffs' Motion to Amend the Complaint to Substitute the Personal Representative of the Estate is **GRANTED**.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

This case arises from a motor vehicle collision that occurred on February 7, 2002, at the intersection of Jackson Street and Delaware Avenue in Wilmington, Delaware. The Plaintiffs allege, *inter alia*, that the Defendant negligently proceeded through a red light at that intersection and struck another vehicle operated by the Plaintiff, Maureen Dunning.[1] The Plaintiffs filed their initial complaint in this case on December 2, 2003. The Defendant filed her Answer on January 9, 2004. The parties stipulated to neutral assessment in lieu of arbitration on March 2, 2004.[2] Unfortunately, on October 31, 2004, the Defendant died of natural causes unrelated to the February 7, 2002 accident.[3] Apparently, the parties were represented at the January 6, 2005 mediation conference, but remained "at impasse."[4] Thus, the Court issued a scheduling order on April 25, 2005[5] and the case was set for trial on March 27, 2006.[6]

On April 25, 2005, Mr. John J. McCloskey filed and served the Rule 25(a)(1) Notice of Suggestion of Death that is presently at issue.[7] Mr. McCloskey is the Defendant's surviving

[1] D.I. 1.
[2] D.I. 7.
[3] Def. Mot. to Dismiss, D.I. 14, ¶ 2, at 1.
[4] D.I. 8.
[5] D.I. 13.
[6] D.I. 13.
[7] D.I. 12.

spouse but is not a party to this action.[8] At the time of this filing, no will was filed with the Register of Wills nor had an estate been opened on the Defendant's behalf. However, Mr. McCloskey did make the necessary filing under 12 *Del. C.* § 2306 for purposes of making distribution of her personal estate, which was valued at less than $30,000.[9]

On August 18, 2005, the Defendant filed the instant Motion to Dismiss.[10] The Plaintiffs responded on September 6, 2005, asserting in part that they were attempting to have a personal representative appointed and requesting an extension of time.[11] On September 27, 2005, the Plaintiffs filed the present Motion to Amend the Complaint to substitute Mr. Dallas J. Winslow, Esquire for the Defendant, who was appointed Personal Representative of the her Estate one day earlier, on September 26, 2005.[12]

II. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 12(b)(6), "a motion to dismiss is appropriate where plaintiff has failed to state a claim upon which relief can be granted."[13] If "matters outside the pleadings are presented to the Court," upon such motion, it "shall be treated as one for summary judgment" in accordance with Superior Court Civil Rule 56.[14] "When considering a Motion for Summary Judgment, the Court's function is to examine the record to determine whether genuine issues of material fact exist."[15] "If, after viewing the record in a light most favorable to the non-moving party, the Court finds that there are no genuine issues of material fact, summary

[8] *Dunning v. L. McCloskey*, Tr. Mot. Dismiss (Nov. 8, 2005), at 13.
[9] Tr. at 2-3.
[10] D.I. 14.
[11] D.I. 16.
[12] D.I. 18.
[13] *Pender v. Daimlerchrysler Corp***,** 2004 WL 2191030, at *2 (Del. Super. 2004).
[14] Super. Ct. Civ. R. 12(b).
[15] *Shively v. Ken-Crest Centers for Exceptional Persons***,** 1998 WL 960719, at *1 (Del. Super. 1998).

judgment will be appropriate."[16] Summary judgment is not granted where the record shows "a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[17]

As the Superior Court Civil Rules are virtually identical to their federal counterparts, federal court reasoning underlying the construction of the Federal Rules is of "'great persuasive weight'"[18] This is particularly true with regard to Superior Court Civil Rule 25(a) (hereinafter "Rule 25" or the "Rule").[19]

Rule 25 addresses the substitution of parties. It states that if a party dies and the claim is not extinguished, the Court may order substitution of the proper parties.[20] In such circumstance, the Rule provides that a "motion for substitution may be made by any party or the successors or representatives of the deceased party."[21] The Supreme Court of Delaware's construction of Rule 25 limits the entities who qualify to suggest death upon the record "to those who may move for substitution" under the Rule.[22] Only a "party, or the successors or representatives of the deceased qualify to suggest death upon the record and/or a motion for substitution.[23]

Further, the Rule requires that an "action shall be dismissed as to the deceased party" unless "the motion for substitution is made not later than 90 days after the death is suggestion upon the record."[24] Enlargement of the 90-day substitution period after its expiration "is a matter

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[16] *Id*.
[17] *Id*.
[18] *Hoffman v. Cohen*, 538 A.2d 1096, 1098 (Del. 1988), *citing Canaday v. Superior Court*, 119 A.2d 347, 352 (Del. 1956); *Tiffany v. O'Toole Realty Co.*, 153 A.2d 195, 199 (Del. Super. Ct. 1959); *see Roberts v. Roberts*, 737 A.2d 511, 513 (Del. 1999).
[19] *Hoffman*, 538 A.2d at 1098; *see also Roberts*, 737 A.2d at 513 (construing the analogous Fam. Ct. Civ. R. 25); *accord. Craft v. Vakili*, 1997 WL 913499, at *2-3 (Del. Super.).
[20] Super. Ct. Civ. R. 25(a)(1).
[21] *Id.*
[22] *Hoffman*, 538 A.2d at 1101-02; *see Craft*, 1997 WL 913499, at *2.
[23] *Hoffman*, at 1102; *Craft*, at *2.
[24] Super. Ct. Civ. R. 25(a)(1).

of judicial discretion."[25] While "Rule 25(a) confers no discretion … to extend the 90-day period … Rule 6(b) grants such discretionary authority to the court though application be not made until after the expiration of the 90-day period, '…where the failure to act was the result of excusable neglect.'"[26] Thus, the "test for the exercise of discretion is fixed by Superior Court Civil Rule 6(b) (hereinafter "Rule 6(b)") as excusable neglect."[27] Excusable neglect "is neglect that 'might have been the act of a reasonably prudent person under the circumstances.'"[28] The burden of establishing excusable neglect belongs to the party seeking the extension.[29] To that end, a party must demonstrate both good faith and "some reasonable basis for non-compliance."[30] Ordinarily, motions for "discretionary extensions under Rule 6(b) and 25(a) (1) are … granted unless the delay in filing is a result of the moving party's bad faith, or the delay would result in undue prejudice to the non-moving party."[31]

III. DISCUSSION

A. Timeliness and the Suggestion of Death

All of the issues presented by the pending Motions concern Rule 25 and substitution of a Personal Representative for the Defendant in the present litigation. Through the present Motion to Dismiss, the Defendant avers that the ninety-day period provided for in Rule 25(a) expired before the Plaintiffs filed their Motion to Amend the Complaint on September 27, 2005. The Defendant further argues that the two-year statute of limitations for filing a personal injury action against the Defendant's Estate lapsed. Therefore, the Defendant maintains, pursuant to Superior

[25] *Doherty v. Straughn*, 407 A.2d 207, 211(Del. 1979).
[26] *Id.* In pertinent subpart, Super. Ct. Civ. R. 6(b) states: "the Court for cause shown may at any time in its discretion… (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."
[27] *Doherty*, 407 A.2d at 211; *Brenner v. Robinson*, 1981 WL 384506, at *3 (Del. Super.).
[28] *Daniels v. Bayhealth Medical Center*, 2001 WL 392477, at *3 (Del. Super.).
[29] *Wilson v. JOMA, Inc.*, 1989 WL 68304, at *2 (Del. Supr.).
[30] *Wilson v. JOMA, Inc.*, 1989 WL 68304, at *2; *Wilson v. DeMaio*, 1988 WL 130398, at *2 (Del. Super.).

Court Civil Rule 12(b), that the Plaintiffs fail to state a claim for which relief can be granted.[32]

In response, the Plaintiffs argue that the April 25, 2005 Suggestion of Death filed by Mr. McCloskey does not trigger the ninety-day period as it was not filed by a qualified person and it failed to identify a person to substitute for the Defendant.[33] The Plaintiffs assert that because Mr. McCloskey is neither the personal representative nor executor, he is not a proper party for substitution and therefore is unqualified to suggest death upon the record. Further, the Plaintiffs aver that this renders the Suggestion inadequate because it does not identify a proper party for substitution.[34] In the alternative, the Plaintiffs request an extension of the ninety-day period because of excusable neglect pursuant to Rule 6(b), if the Court finds the Suggestion sufficient and the substitution period expired.

B. <u>Mr. McCloskey's Qualification to File a Suggestion of Death Upon the Record</u>

First the Court considers whether Mr. McCloskey was qualified to make the April 25, 2005 Suggestion of Death upon the record. The Plaintiffs rely on *Tiffany v. O'Toole*,[35] this Court's "first careful examination"[36] of an earlier version of Rule 25, to contest Mr. McCloskey's qualifications. In *Tiffany,* the Court granted the defendant's motion to dismiss a deceased plaintiff's claims, which arose from injuries suffered by plaintiff's surviving spouse, for failure to move for substitution within the two years then required by Rule 25.[37] The Court rejected the surviving spouse's contention that "no formal substitution was necessary" under Rule 25, because her husband's claim passed to her.[38] The Court in *Tiffany* held "that even

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[31] *Brenner*, 1981 WL 384506, at *3; *see Wilson*, 1988 WL 130398, at *2.
[32] Mot. to Dismiss, ¶ 8.
[33] Plt. Resp. to Def. Mot. to Dismiss, D.I. 16, at 1-3.
[34] *Id*. at 2-3.
[35] *Tiffany*, 153 A.2d 195.
[36] *Hoffman*, 538 A.2d at 1098.
[37] *Tiffany*, at 200.
[38] *Daniels*, 2001 WL 392477, at *2 (explaining *Tiffany*, 153 A.2d 195).

though she was a party to the action in her individual capacity, was her husband's beneficiary, and was subsequently appointed his executrix, the *failure to substitute her in her capacity as executrix within the time required* by the rule was fatal to his claim."[39]

This Court does not find *Tiffany* helpful in the present case, even though it is uncontested that Mr. McCloskey is not a party, an executor, or the personal representative of his deceased defendant spouse's estate. The Defendant asserts Mr. McCloskey's status as *distributee* made him a qualified party to suggest of death upon the record, sufficient to trigger the 90-day substitution period. The Defendant does not seek to *substitute* him as a party, nor apparently do the Plaintiffs, who requested the appointment of Mr. Winslow to serve as personal representative in the case. Thus, even though a surviving spouse may not automatically acquire the rights of the decedent under *Tiffany* that issue is not presently before the Court because Mr. McCloskey is a distributee of a distributed estate, and as such, qualifies to suggest death upon the record.

The Plaintiffs correctly point out that in *Hoffman v. Cohen*, the Supreme Court adopted and relied upon the Federal Advisory Committee's Notes for Federal Rule of Civil Procedure 25(a)(1) and the Court of Appeals for the District of Columbia's reasoning in the *Rende v. Kay* decision and its progeny.[40] Reversing a Superior Court decision denying a motion to substitute upon finding a deceased defendant's attorney unqualified to suggest death,[41] the Supreme Court interpreted the Committee's Notes "as intending to limit the persons who may suggest death upon the record" to those who can move for substitution, *i.e.* a party, a representative or a successor.[42] It also noted the *Rende* Court's analysis of the Advisory Committee's addition of "successor" to the Rule which would operate to "take care of the case of … the distributee of an

[39] *Id.* (emphasis added).
[40] Plt. Resp., at 1-2; *Hoffman*, 538 A.2d at 1099-1100; *Craft*, 1997 WL 913499, at *2; *Rende v. Kay*, 415 F.2d 983 (D.C. Cir. 1969).
[41] *Hoffman*, 538 A.2d at 1102.

estate that had been distributed.[43] Although, the Supreme Court did not specifically address distributees beyond its footnoted reference to *Rende*, the Court of Appeals for the District of Columbia, and other federal courts, continue to follow *Rende*, reasoning that "the addition of the word 'successor' to the rule means that a proper party need not necessarily be the appointed executor or administrator of the deceased party's estate."[44] These courts hold that "the distributee of a distributed estate is a 'proper party' for substitution under Federal Rule 25(a)(1)."[45]

Like the Supreme Court in *Hoffman*, this Court finds the reasoning of *Rende* and its progeny "not only persuasive but compelling" as to its determination of this question.[46] The Court finds that the word "successor" encompasses a distributee of a distributed estate. Therefore, like a successor, which is one of the limited entities "who may move for substitution" under the Rule in Delaware, a distributee also qualifies to suggest death upon the record as a "successor" within the meaning of Rule 25(a).

Based on its review of the record, viewed in a light most favorable to the Plaintiffs, the Court finds that Mr. McCloskey is a distributee of the deceased Defendant's distributed estate. The Motion to Dismiss hints at Mr. McCloskey's status at ¶ 2, stating "no will …was filed with the Register of Wills and no estate …opened … although affidavits have been filed … by [Mr. McCloskey], regarding jointly held property … and the non-application of the estate tax." The Defendant's Counsel further clarified Mr. McCloskey's status at oral argument on this Motion

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[42] *Craft*, at *2 (explaining *Hoffman*, 538 A.2d 1096).
[43] *Hoffman*, 538 A.2d at 1100 n.2; *citing Rende*, 415 F.2d at 985.
[44] *Sinito v. U.S. Dept. of Justice*, 176 F.3d 512, 516 (D.C. Cir. 1999), *citing Rende*, 415 F.2d at 985; *accord. McSurely v. McClellan*, 753 F.2d 88, 98-99 (D.C. Cir. 1985).
[45] *McSurely*, 753 F.2d at 98-99; *see Roe v. City of New York*, 2003 WL 22715832, at *2 (S.D.N.Y. 2003); *Sequoia Property and Equipment Ltd. Partnership v. U.S.*, 2002 WL 32388132, at *2 (E.D. Cal. 2002); *Sinito*, 176 F.3d 512; *Hardy v. Kaszycki & Sons Contractors, Inc*., 842 F.Supp. 713, 716-17 (S.D.N.Y. 1993); *Gronowicz v. Leonard*, 109 F.R.D. 624, 626 (S.D.N.Y. 1986).

when he informed the Court that Mr. McCloskey "made a filing under Title 12 to distribute the decedent's property without letters testamentary being issued because her estate was valued at less than $30,000, and there was no will."[47] He explained "[w]hat Mr. McCloskey did was file a number of affidavits [pursuant to the requirements of 12 *Del. C.* § 2306] and, with that, the Register of Wills was done, and he was done."[48] The Defendant's Counsel further explained that "all of [the Defendant's] property was jointly owned and, so, it passed to Mr. McCloskey on her death" and that "[he] was a distributee of the estate."[49]

For the foregoing reasons, the Court holds that the April 25, 2005 Suggestion of Death filed by Mr. McCloskey, the distributee of the deceased Defendant's distributed estate, was filed by a qualified successor within the meaning of Rule 25. Even so, the Court declines to grant summary judgment for the Defendant because it finds genuine issues of material fact remain as to the Defendant's negligence in the vehicle collision.

C. Adequacy of the Suggestion of Death Upon the Record

The Plaintiffs further challenge the validity of the Suggestion of Death arguing it does not identify a "proper party" for substitution and, as a result, can not trigger the 90-day substitution period. However, because of the appointment of a Personal Representative for the Defendant's Estate and this Court's decision on the Plaintiffs' Motion to Extend, the Court does not reach this issue.

The Court recognizes the disagreement among the federal courts over whether a valid Suggestion, sufficient to trigger the 90-day substitution period under Federal Rule 25, must

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[46] *Hoffman*, 538 A.2d at 1099-1100; *citing Rende*, 415 F.2d 983; *McSurely*, 753 F.2d at 88; *Gronowicz*, 109 F.R.D. at 624.
[47] Tr. at 2.
[48] *Id*.
[49] Tr. at 2, 3. (Emphasis added).

identify a representative of the estate.[50] Courts that follow *Rende* interpret Rule 25 to require identification out of concern, that to do otherwise, places on a plaintiff "the burden of tracking down the proper representative of the estate" within the 90 days.[51] However, other courts, including the Second Circuit, disagree with *Rende* on this point, "finding no need to read beyond the written words of the Rule."[52] Instead, those courts opt to use Federal Rule 6(b) to address any such difficulties that interfere with satisfying the 90-day requirement.[53] Without expressing an opinion, the Court notes that the latter approach is comparable to this Court's use of the discretionary authority provided for under Rule 6(b) to expand the Rule 25 substitution period.[54]

D. Motion to Extend Time and Excusable Neglect

In their Response to the Defendant's Motion to Dismiss, the Plaintiffs move in the alternative for an extension of the 90-day substitution period pursuant to Rule 6(b) on the grounds of excusable neglect. They explain that after service of the April 25, 2005 Suggestion of Death, "confusion" arose while they awaited appointment of a personal representative.[55] They contend that, after receiving the Suggestion of Death, Plaintiffs' Counsel anticipated that the Defendant's surviving spouse, Mr. McCloskey, would open the estate. That did not occur.

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[50] This conflict appears in *Hoffman* at footnote 2. Footnote 2 opens with the following observations by the *Rende* Court: "'[t]he Advisory Committee in outlining that the suggestion could be made by the representative of the deceased party' plainly contemplated the suggestion emanating *from the side of the deceased* would identify a representative of the estate, such as an executor or administrator, who could be substituted for the deceased as a party…" It concludes however, by citing to the District Court for the Southern District of New York's *Yonofsky v. Wernick* case, 362 F.Supp. 1005 (S.D.N.Y. 1973), which held "the surviving party need not identify a representative of the estate in a suggestion of death. *See Unicorn v. Banerjee*, 138 F.3d 467 (2d Cir. 1988); *Kernisant v. City of New York,* 225 F.R.D. 422, 427 n.4 (E.D.N.Y. 2005); *Ray v. Koester*, 215 F.R.D. 533, 534 (W.D. Tex. 2003) (following the Second Circuit's holding in *Unicorn v. Banerjee*); *Pastorello v. City of New York*, 2000 WL 1538518, at *2 (S.D.N.Y. 2000); *compare Young v. Patrice*, 832 F.Supp. 721, 725 (S.D.N.Y. 1993) (citing to authority interpreting Rule 25 to require "at least the naming of the executor").
[51] *Lyght v. City of New York*, 1988 WL 69920, at *2 (E.D.N.Y. 1988); *McSurely*, 753 F.2d at 98; *but see Unicorn*, 138 F.3d at 471; *Ray*, 215 F.R.D. at 534-35.
[52] *Ray*, at 534.
[53] *Swiggett v. Coombe*, 2003 WL 174311, at *2 (S.D.N.Y. 2003).
[54] *Doherty*, 407 A.2d at 211.
[55] Plt. Resp., at 1.

Instead, the Plaintiffs received the Motion to Dismiss after the substitution period lapsed.[56] The Plaintiffs' Counsel explained at oral argument that she was waiting of an entity to be named that she could substitute for the Defendant. Based on her interaction with the Register of Wills and her reading of the Rule, the Plaintiffs' Counsel did not believe Mr. McCloskey to be a suitable substitute because he was not a party, administrator or personal representative.[57]

Excusable neglect "is neglect that 'might have been the act of a reasonably prudent person under the circumstances.'"[58] It may be found in Rule 25(a) situations, where the moving party is aware of the rules pertaining to substitution, but claims an appropriate substitute was not available within the 90-day substitution period and the movant gives sufficient explanation for the filing delay.[59] When the Court is satisfied that the failure to file timely motions is not the result of bad faith on the part of the moving party, and there is no indication that the non-moving party has been prejudice by the delay, such motions are granted.[60]

The Plaintiffs' Counsel was plainly aware of the rule pertaining to substitution, and, arguably, could have moved sooner to open the estate. However, it was not unreasonable to anticipate that Mr. McCloskey, as surviving spouse, would open an estate on behalf of his deceased spouse. Moreover, the record shows the Suggestion of Death filed by Mr. McCloskey did not include the name of a personal representative (presumably because one did not need to be appointed for him to proceed under 12 *Del. C*. §2306). Thus, this failure to name a personal representative in the Suggestion required the Plaintiffs to first ascertain whether a representative of the estate existed and, after becoming aware no estate would be opened, to appoint someone to serve in that capacity.

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[56] Tr. at 14.
[57] Tr. at 13-14.
[58] *Daniels*, 2001 WL 392477, at *3.
[59] *Wilson*, 1988 WL 130398, at *3.

Moreover, Plaintiffs' representation that their Counsel checked with the Register of Wills in their attempt to locate a party for substitution, further supports a finding of excusable neglect in this case.[61] The Court notes that no notice of Mr. McCloskey's status as distributee or his intent to distribute the estate pursuant to 12 *Del. C*. §2306 appears in record prior to the Motion to Dismiss, which was filed after the substitution period expired.[62] Again, the Motion provides an inkling as to his distributee status at ¶ 2, affirming that "no will …was filed with the Register of Wills and no estate …opened … although affidavits have been filed … by [Mr. McCloskey], regarding jointly held property … and the non-application of the estate tax." Clearly, this information was relevant to, and may have hastened, Plaintiffs' actions with regard to substitution. Finally, as the Plaintiffs point out, the 90-day period expired on July 25, 2005, only thirty-eight days before they moved to extend the time for substitution.[63]

The record also indicates that the Defendant's Counsel was served with the Suggestion of Death and, at some point, became aware of Mr. McCloskey's decision not to open an estate for the Defendant. Under these circumstances, the Court finds the Defendant suffered no undue prejudice as a result of this delay. Even though delays in filing motions for substitution or enlargement are not encouraged,[64] the Court finds the delay in this case is the result of excusable neglect and not the product of bad faith on the part of the Plaintiffs. Given that the "90-day period was not intended to act as a bar to otherwise meritorious actions, to rule otherwise would prevent this case from proceeding to trial on the merits.[65]

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[60] *Brenner*, 1981 WL 384506, at *3.
[61] Tr. at 14.
[62] D.I. 14.
[63] Plt. Resp., at 4.
[64] *Tattersen v. Koppers Co., Inc.*, 104 F.R.D. 19, 20 (W.D. Pa. 1984); *see Wilson*, 1988 WL 130398, at *2.
[65] *Rende*, 415 F.2d at 986; *see Long v. White*, 833 A.2d. 475, 479 (Del. Fam. Ct. 2003) (granting an extension for filing the analogous Fam. Ct. Civ. R. 6(b) and 25(a)).

III. CONCLUSION

For the above reasons, the Defendant's Motion to Dismiss is **DENIED**, the Plaintiffs' Motion for Extension of Time to substitute the Personal Representative, Dallas J. Winslow, Jr., Esquire, is **GRANTED**, and the Plaintiffs' Motion to Amend the Complaint to Substitute the Personal Representative, is also **GRANTED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge